



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

February 26, 2009

EX PARTE SUBMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Portals
Washington, DC 20554

**RE: Docket No 96-45, DA 08-2779
TracFone Wireless, Inc. Petition For Modification Of
Public Safety Answering Point Certification Condition**

**Docket No. 96-45, DA 07-4983
Virgin Mobile USA, L.P.'S Petitions For Forbearance And
Designation As An Eligible Telecommunications Carrier In
The State Of New York And The Commonwealths Of
Pennsylvania And Virginia**

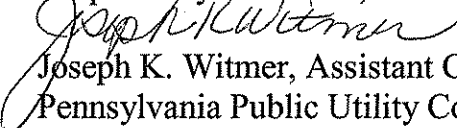
Dear Ms. Dortch:

Pursuant to 47 CFR 1.1206(b)(1), the Pennsylvania Public Utility Commission (PaPUC) formally files the written attached ex parte presentation with the Secretary. An original and four copies of the filing have been mailed first class consistent with 47 CFR 1.1206(b)(1), in addition to this electronic filing made today.

The PaPUC also provided a copy by first class mail and electronically to the FCC's duplicating contractor and the Telecommunications Access Policy Division personnel consistent with the the FCC's Notices in DA 08-2779 and DA 07-4983. The PaPUC also provided a copy via first class mail and electronically to Counsel for TracFone Wireless and Virgin Mobile's counsel to ensure a just and timely notice.

The PaPUC provided a copy to the FCC Commissioners and their respective staff.

Respectfully submitted,


Joseph K. Witmer, Assistant Counsel
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-3663

Enclosures

cc: FCC Commissioners & Staff
Pennsylvania Emergency Management Agency

**Before the
 Federal Communications Commission
 Washington, D.C. 20554**

In the Matter of)	
)	
Petition of TracFone Wireless, Inc.)	CC Docket No. 96-45
For Modification of Public Safety Answering)	DA 08-2779
Point Modification)	
)	
Virgin Mobile USA, L.P.'s Petition)	CC Docket No. 96-45
For Forbearance and Designation as)	DA No. 07-4983
An Eligible Telecommunications Carrier in)	
The State of New York and the)	
Commonwealths of Pennsylvania and Virginia)	

**EX PARTE FILING OF
 THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) files this written Ex Parte filing on the pending matters in these two proceedings. Virgin Mobile seeks forbearance from Section 254 and ETC designation in Pennsylvania. The TracFone Modification petition asks the FCC to amend requirements imposed on TracFone when the FCC granted TracFone's ETC designation in Pennsylvania. Recently, the Pennsylvania Emergency Management Agency (PEMA) petition asked the FCC to revoke TracFone's "self certification" that it is in compliance with Pennsylvania law, another condition the FCC imposed on TracFone when the FCC granted TracFone ETC designation in Pennsylvania.

The PaPUC Ex Parte filing informs the FCC that on February 26, 2009, the PaPUC issued a Secretarial Letter stating its decision to affirmatively address ETC Petitions by wireless carriers and related matters pursuant to Section 214 of the Telecommunications Act of 1996. The PaPUC will adjudicate these matters in accordance with FCC's "primary jurisdiction" precedent.¹ A copy is attached.

The PaPUC's action places these pending ETC designations and related matters involving the Commonwealth of Pennsylvania back with the PaPUC under the FCC's "primary jurisdiction" precedent. The PaPUC asks the FCC to deny the pending ETC designation and related matters involving the Commonwealth of Pennsylvania. That includes the Virgin Mobile, TracFone Modification, and PEMA petitions. Denial allows the PaPUC to address these issues.

The PaPUC recognizes that the FCC must act on the pending Virgin Mobile forbearance request by March 5, 2009 or the petition could be deemed granted as a matter of law under Section 160(c), 47 U.S.C. § 160(c).

The PaPUC believes that denial of that forbearance request is appropriate. Denial of that forbearance as well as denial of the other pending ETC petitions and related matters is appropriate given the PaPUC's Secretarial Letter.

The PaPUC recognizes that the FCC has acted in the past when a state commission, as in Pennsylvania's case, refrained from exercising its jurisdiction in ETC designation requests. However, recent experiences with public safety, including an obligation to comply with Pennsylvania law, and considerations of

¹ *In the Matter of Petitions for Designation as an ETC*, 12th Report and Order, Docket No. 96-45, June 30, 2000, Paragraphs 92 and 93 (*12th Report and Order*); *TracFone Wireless Petition for ETC Designation*, Docket No. 96-45, April 11, 2008, Paragraph 2.

the public interest convinced the PaPUC to affirmatively and proactively exercise its jurisdiction. The PaPUC now concludes that ETC petitions and related matters involving Pennsylvania should be addressed by the PaPUC for certification of the ETC designation and related matters instead of the FCC.

The PaPUC does not lack jurisdiction to address ETC petitions and related matters. Rather, Section 214 (e)(2) of the Telecommunications Act of 1996 and the FCC's regulations at 47 C.F. R. §§54.201, *et seq.* provide plenary jurisdiction to the PaPUC to determine whether requests by wireless carriers are to be designated as ETC carriers in Pennsylvania. Also, wireless carriers invoke PaPUC jurisdiction to mediate, arbitrate, and approve wireless interconnection agreements under the federal Telecommunications Act of 1996 (TA-96). Further, wireless carriers also invoke PaPUC delegated jurisdiction over scarce federal numbers so that wireless carriers can obtain numbers for their Pennsylvania operations.

In addition, Section 332(c)(3)(A) of the Communications Act of 1934, 47 U.S.C. § 332(c)(3)(A), prohibits the state commissions from exercising authority over wireless rates and market entry or exit. Federal law authorizes the state commissions to address terms and conditions of wireless services – and ETC designations and related matters under Section 214(e)(2) constitute terms and conditions of wireless service. This is consistent with the FCC's view of Section 332 as a separate basis for jurisdiction.²

Recent Pennsylvania legislation reinforces the importance of ensuring compliance with public safety obligations of wireless carriers. This includes an

² *Local Competition Report and Order*, 11 FCC Rcd at 16005, paragraph 1023 (A decision to proceed under one provision (in that case Sections 251 and 252) does not repeal Section 332 jurisdiction).

obligation to financially support the provision of 911 call response services by public safety answering points (PSAPs) in Pennsylvania.

Finally, the PaPUC again reminds the FCC that TracFone Wireless and Virgin Mobile failed to comply with FCC requirements on notifying state commissions about their ETC petitions and related matters. The FCC established that requirement in the *12th Report and Order* on June 30, 2000. This was a requirement of the FCC when making ETC designations under Section 214(e)(6).

The FCC has long required a requesting carrier to consult with the state commission about ETC designation. The carriers are required to provide an “affirmative statement” that the state commission lacks jurisdiction to perform designations over a particular carrier. The FCC requires each carrier to consult with the state commission and prohibits reliance on notifications that may have been provided to similarly situated carriers.³

TracFone and Virgin Mobile never attached the required PaPUC letter addressing their specific request for ETC designation. Neither TracFone nor Virgin Mobile asked the PaPUC for a letter. Instead, TracFone and Virgin Mobile provided the earlier PaPUC Letter in the *Nextel ETC Designation* petitions⁴ as though this constituted compliance with FCC rules, which is not the case.

³ *In the Matter of Petitions for Designation as an ETC*, 12th Report and Order, Docket No. 96-45, June 30, 2000, Paragraph 113.

⁴ *In the Matter of Virgin Mobile Petition for ETC Designation in Pennsylvania*, Petition of Virgin Mobile, Exhibit 1 (NEP Letter dated February 27, 2007); *In the Matter of TracFone Wireless, Inc. for ETC Designation in Pennsylvania*, Docket No. 96-45, Exhibit B (NEP Letter dated February 27, 2007). The PaPUC already commented on the procedural matters surrounding how TracFone Wireless secured their ETC designation from the FCC in the pending *TracFone Wireless Modification Petition* so they need not be repeated here. See *TracFone Wireless Modification Petition*, PaPUC Reply Comments, p. 12, n. 3.

The PaPUC never issued a comprehensive order addressing an entire class of carriers as occurred in Virginia.⁵ In fact, the PaPUC issued letters for *Nextel* and *NEP* while reserving the right to exercise jurisdiction in other ETC status designation cases – and the FCC recognized that limitation.⁶

TracFone and Virgin Mobile never complied with FCC requests to contact the PaPUC. The PaPUC was never provided a copy of any forbearance or ETC petition nor did the carriers ask the PaPUC to issue a Secretarial Letter addressing their ETC requests as happened with the *Nextel* and *NEP Cellcorp, Inc.* ETC status designation requests. The arbitrary and capricious actions of TracFone and Virgin Mobile regarding FCC requirements placed the PaPUC in an extremely untenable position. The FCC should not ratify those actions with affirmative relief, particularly in light of the PaPUC Secretarial Letter.

These legal and policy considerations warrant denial of the pending ETC petitions and related matters involving Pennsylvania. Issuance of the PaPUC's Secretarial Letter under the FCC's "primary jurisdiction" precedent means that ETC designation and related matters will now be more effectively addressed by action of the PaPUC in Pennsylvania. This is better than forcing Pennsylvania agencies, carriers, and others to litigate those matters at the FCC.

⁵ *In the Matter of Virginia Cellular LLC*, Docket No. 96-45 (January 22, 2004), Paragraph 13; *In the Matter of Highland Cellular, Inc.*, Docket No. 96-45 (April 12, 2004), Paragraph 13.

⁶ Compare *In the Matter of Virgin Mobile Petition for ETC Designation*, Docket No. 96-45, Petition of Virgin Mobile, Exhibit 1 (PaPUC Secretarial Letter dated February 26, 2007 for NEP Cellcorp, Inc.) with *In the Matter of High-Cost Universal Service Support*, Docket No. 96-45, (May 1, 2008) (Exhibit B, Paragraph 10 and n. 30 (NEP ETC Designation) and *In the Matter of NPCR, Inc. (Nextel Partners) for TEC Designation*, Docket No. 96-45 (August 25, 2004), Paragraph 10 (the effect of the PaPUC letter on jurisdiction is limited to Nextel).

For these reasons, the PaPUC asks the FCC to deny all pending ETC petitions and related matters so that the parties can properly present those issues before the PaPUC consistent with the February 26, 2009 Secretarial Letter.

In the event the FCC decides to retain authority and act on the pending ETC petitions and matters involving Pennsylvania because they arose before the Secretarial Letter, the PaPUC asks the FCC to deny the pending forbearance request given the looming March 5, 2009 deadline. The pending forbearance matter is unlike the previously decided TracFone forbearance petition. Unlike the TracFone forbearance petition, the PaPUC expressed its concerns given the impact in Pennsylvania. Moreover, the PaPUC issued a Secretarial Letter.

The PaPUC also asks the FCC to refrain from acting on the Virgin Mobile ETC Petition. The FCC cannot impose the TracFone ETC precedent as though that precedent is controlling given the substantial and unresolved 911 public safety and state law issues in the pending TracFone Modification petition. If the FCC must address the Virgin Mobile ETC petition,, the FCC should do so only after resolution of, and consistent with, the public safety and state law issues evident in the TracFone Modification and PEMA petitions.

On those petitions, the PaPUC believes that denial of TracFone's Modification petition and granting of PEMA's petition is appropriate given the evidentiary record in these proceedings. This record reflects serious issues over the lack of drive testing for the proper transmission of TracFone's wireless 911 calls to the appropriate PSAP, and raise fundamental and unresolved public health and safety concerns. Those issues could be resolved by wireless carrier

commitments to conducting the needed testing on the same terms as all other wireless carriers and to provide carrier support for 911 under Pennsylvania law.⁷

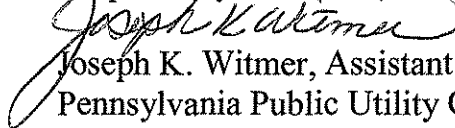
This has not happened and TracFone has not undertaken concrete commitments to rectify the situation.

If the FCC decides to retain authority over the pending wireless ETC petitions and related matters that involve Pennsylvania, the PaPUC asks the FCC to deny the Virgin Mobile ETC forbearance and ETC petitions, deny the TracFone Modification petition, and grant the PEMA petition.

However, the PaPUC reiterates a preference that the FCC deny all pending ETC petitions and related matters given the PaPUC's decision to exercise jurisdiction over wireless carrier ETC requests and related matters. Denial of these pending matters is appropriate given the PaPUC's conclusion that addressing ETC petitions and related matters should occur in Pennsylvania.

The PaPUC appreciates the opportunity to submit this Ex Parte filing.

Respectfully submitted,


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Dated: February 26, 2009

⁷ In re: TracFone Wireless, Inc. Petition for Modification of Public Safety Answering Point Certification Condition, Docket No. 96-45, DA 08-2772, Letter Comment of the PaPUC (January 6, 2009), Reply Comments of the PaPUC (January 13, 2009), pp. 2-16; Ex Parte Letter of the PaPUC (January 29, 2009).



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PENNSYLVANIA PUBLIC UTILITY COMMISSION
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IN REPLY PLEASE
REFER TO OUR FILE
M-2009-2091317
M-009609799

February 26, 2009

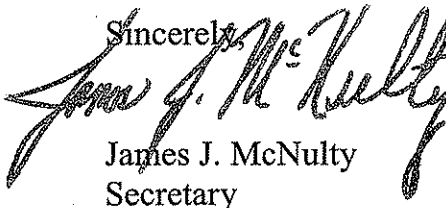
Re: *Commission Exercise of Jurisdiction to Designate Wireless Carriers
As An Eligible Telecommunications Carrier (ETC) Pursuant to 47 U.S.C.
§214(e)(2) of the Telecommunications Act of 1996 (TA-96),
Docket No. M-00960799 (M-2009-2091317)*

To All Telecommunications Carriers, Interested Parties and the Public:

This is to advise that effective February 26, 2009, the Pennsylvania Public Utility Commission (Commission) will exercise the jurisdiction under 47 U.S.C. § 214(e)(2) and 47 C.F.R. §§ 54.201, *et seq.* to determine whether requests by wireless carriers to be designated as an "eligible telecommunications carrier" (ETC) in Pennsylvania are necessary and in the public interest. As such, all petitions and matters related to requests for ETC designations under Section 214 must be filed with and approved by the Commission.

The Commission action on wireless carrier ETC petitions and matters is guided by Federal Communications Commission (FCC) or other Commission precedent and determinations. This includes, but is not limited to, *Petition of NEP Cellcorp, Inc. for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania*, Docket No. 96-45 (May 1, 2008)(Appendix B); *In the Matter of TracFone Wireless, Inc. Petition for ETC Designation in the Commonwealth of Pennsylvania*, Docket No. 96-45 (April 11, 2008); *In the Matter of NPCR, inc. d/b/a Nextel Partners, Petition for ETC Designation in the Commonwealth of Pennsylvania*, Docket No. 96-45 (August 25, 2004); *In the Matter of Federal-State Joint Board on Universal Service*, Docket No. 96-45 (March 17, 2005); *In the Matter of Federal-State Joint Board on Universal Service*, Docket No. 96-45 (June 30, 2000); and *Procedures for Designation of ETC Carriers Pursuant to Section 214(e)(6) of TA-96*, Docket No. 97-419 (December 29, 1997), *et seq.*

Public notice of this decision shall be published in the Pennsylvania Bulletin and posted on the Commission's website.

Sincerely,

James J. McNulty
Secretary

cc: Federal Communications Commission